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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ZANE SHANOSKI, Plaintiff and Respondent, v. ARNOLD JOEL NEIMAN, Defendant and Appellant.	D048337 (Super. Ct. No. GIN040838)

APPEAL from an order of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed, with directions.

In November 2004, plaintiff and respondent Zane Shanoski (Plaintiff) brought a complaint against appellant Arnold Joel Neiman (Defendant), seeking damages for misrepresentation, breach of the corporate securities act, and rescission of a contract for the purchase of securities. (Corp. Code, § 25401.) The complaint was amended in July 2005. After about six months of discovery, motion practice, and trial preparation hearings took place, Defendant brought a motion to compel arbitration, based on a clause

in a real estate buy-sell agreement between the parties that was entered into the same month as the securities purchase, June 2000. (Code Civ. Proc., § 1281.2; all further statutory references are to the Code of Civil Procedure unless otherwise noted.)

The trial court denied the motion to compel arbitration, ruling that the fraud complaint did not arise out of the subject Residential Purchase Agreement (RPA), which contained the arbitration clause sought to be enforced (arbitration provision), nor was the securities transaction a "resulting transaction" within the meaning of that provision. The court ruled that the scope of the arbitration provision was not sufficiently broad to encompass the securities fraud issues alleged in Plaintiff's complaint. Additionally, the court found Defendant had waived any right to arbitrate through delay and other steps that were inconsistent with demonstrating an intent to arbitrate.

Defendant appeals the order denying the motion to compel arbitration, arguing the RPA was only one part of the overall transaction between the parties, and its provisions should be read together with other contractual agreements, resulting in a finding that the parties intended the arbitration provision to apply to the entire dispute. He further argues no waiver of any right to pursue arbitration occurred.

These contentions lack merit. On this record, the trial court appropriately admitted extrinsic evidence to clarify the intentions of the parties regarding the breadth and applicability of the arbitration provision, and it correctly found no basis to compel arbitration of the issues raised in the complaint. Further, substantial evidence supports the trial court's finding that Defendant waived arbitration through his failure to assert the

right to pursue it in a timely manner, and there was prejudice to Plaintiff sufficient to justify denial of the motion to compel arbitration. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Contentions and Complaint

In June 2000, Plaintiff, a real estate agent, invested $200,000 in a stock subscription agreement (SSA) for preferred stock in Neiman Enterprises, Inc. (NEI). Defendant was the president and principal of NEI, which was promoting commercials to be aired through the Home Shopping Network for a beverages system that was promoted by another company that Defendant owned. NEI made optimistic sales and growth forecasts through year 2002. In its private offering, NEI represented that the loans that Defendant was making to the corporation would not be repaid until NEI showed a positive cash flow.

Plaintiff and Defendant entered into three related agreements during June 2000. First, on June 6, 2000, the parties executed the RPA for the sale of Plaintiff's Encinitas property to Defendant. Plaintiff acted as the real estate agent for himself as the seller and Defendant as the buyer in the transaction, and they planned to resell it immediately. This RPA is a standard form contract that includes the following arbitration and dispute resolution provision:

> "21. DISPUTE RESOLUTION . . . [¶] . . . [¶] B. ARBITRATION OF DISPUTES: Buyer and seller agree that any dispute or claim in Law or equity *arising between them out of this Agreement* <u>*or any resulting transaction*</u>, which is not settled through mediation, shall be decided by neutral, binding arbitration, . . . The arbitrator shall be a retired judge or justice, *or an attorney with at least 5 years of residential real estate law experience*, unless the parties agree to a

> different arbitrator, who shall render an award in accordance with substantive California Law. In all other respects, the arbitration shall be conducted in accordance with [Code of Civil Procedure provisions, including discovery under § 1283.05]." (Italics added.)

On June 6, 2000, the parties entered into a memorandum of agreement ("MOA"), which they jointly drafted and Plaintiff drew up, providing in relevant part:

> "[Defendant and Plaintiff] enter into the following agreement, *as an adjunct to the Real Estate Purchase Agreement* dated June 6, 2000 involving the sale of the residential property known as 228 Via Tavira, Encinitas, purchased by [Defendant] from [Plaintiff]: [¶] [Plaintiff] agrees to sell the above subject property and [Defendant] agrees to purchase the property in the most expeditious manner to close escrow as soon as possible. *The intent of the sale of this property is for the sole purpose of [Plaintiff] buying 100,000 shares of stock in Neiman Enterprises Incorporated Shangri-La Brewing System with the equity proceeds.*" (Italics added.)

Escrow closed and the proceeds enabled Plaintiff to buy the stock from Defendant. On June 27, 2000, they entered into the SSA, which provides in pertinent part:

> "The Undersigned [Zane Shanoski] having received the Private Placement Memorandum of [NEI], hereby agrees to purchase 100,000 shares of [NEI] Series A Preferred Stock at the price of $2.00 per share. [¶] . . . [¶] This agreement is entered into in accordance with the laws of the State of California, *all prior and contemporaneous agreements being merged hereunder.*"(Italics added.)

Sadly, NEI was not a success and it turned out that Plaintiff had been issued common stock instead of the preferred stock he had agreed to purchase. In October 2002, Defendant, on behalf of NEI, filed for corporate bankruptcy, without listing Plaintiff as a creditor or equity security holder. Defendant filed claims in bankruptcy as a secured creditor for loans he had made to the Company, and received some payments. Plaintiff received nothing and the bankruptcy case was closed May 16, 2003.

On November 22, 2004, Plaintiff sued Defendant for damages for intentional misrepresentation, fraud, negligent misrepresentation, and breach of the corporate securities act. He sought rescission of the SSA and imposition of a constructive trust on any remaining investment funds held by Defendant. He also alleged that some of his damages were based on the Encinitas real property sale, by pleading that he was entitled to damages for "the loss of the foreseeable increase in value of the real estate sold to finance the purchase of the stock." However, he did not claim fraud in the real property sale itself, which had long ago been completed at an acceptable price to him.

B. Litigation and Motions Regarding Arbitration

After Plaintiff filed his complaint, Defendant brought a demurrer and a first amended complaint was filed in July 2005. Defendant informally sought arbitration on several occasions. Unfortunately, Defendant's attorney of record, Mr. Hardeman, became gravely ill and formally substituted out of the case in September 2005. Before he did so, he served and attempted to file an answer to the amended complaint, but apparently it was not filed at that time. A new attorney, Mr. Marron, took over for Defendant. Due to lack of trial preparation or any dispute resolution efforts, a scheduled settlement conference was taken off calendar, and the trial date of December 15, 2005 was continued to February and then to April 2006.

As of fall 2005, Plaintiff had propounded form interrogatories and designated a real property valuation expert. Defendant's new attorney again informally requested that Plaintiff's counsel agree to arbitration, but no agreement was reached. Defendant's attorney decided that he needed to pursue both arbitration and trial preparation, and he

served special interrogatories and noticed Plaintiff's deposition for December 2005. At that deposition, December 21, 2005, defense counsel again informally requested that arbitration be pursued, but nothing happened toward that end. The motion and discovery cut-off date was set for March 17, 2006.

Next, defense counsel filed a motion to dismiss for failure to pursue the contractual remedy of arbitration. On February 10, 2006, the trial court denied the motion because it did not fit within the arbitration statutory scheme. Defendant immediately filed a motion to compel arbitration, and obtained the earliest possible hearing date of March 17, 2006 (same as the motion and discovery cut-off date). Defendant also filed a motion to compel further responses by Plaintiff to special interrogatories. (That motion was denied as untimely and sanctions were awarded to Plaintiff.)

In his motion to compel arbitration, Defendant asserted that the arbitration provision in the RPA was controlling, on the basis that the parties had agreed to submit any and all transactions related to the real estate sale to arbitration, including these claims for stock fraud. In his view, the parties had agreed to exchange the real property for stock so that the RPA controlled.

Plaintiff responded to the motion by arguing that, as shown by his declaration, he never intended to submit the securities issues to arbitration. He contended the real estate sale does not form part of the gravamen of his complaint regarding investment fraud and securities violations. Also, he argued Defendant had waived his right to arbitrate the

controversy, due to delay and the ongoing discovery and motion practice that had taken place.

C. Ruling

The trial court issued a tentative ruling and held oral argument. The court first denied Defendant's request to file an amended answer, since at that time, no answer was to be found in the court file, so the court did not believe any could be amended.

After taking the matter under submission, the court issued an order denying the motion to compel arbitration, on the following grounds: First, the action did not arise out of the RPA, containing the arbitration clause sought to be enforced, nor out of any "resulting transaction"; rather, it was a securities fraud case based upon alleged material misrepresentations by Defendant in the sale of securities to Plaintiff. Second, the court found, "the scope of the arbitration provision in the Real Estate Purchase Agreement does not encompass the securities fraud issues alleged in Plaintiff's complaint," and the court found no evidence the parties had intended to submit securities fraud claims to arbitration pursuant to the RPA. To the contrary, "Plaintiff's declaration expressly states he had no such intention." At oral argument, the trial court declined to make factual findings on which agreement was the controlling one, instead simply stating that there was no evidence of the parties' actual intent to submit securities fraud claims to arbitration under the RPA.

As an additional basis for its ruling, the court made findings that "Defendant waived his right to arbitrate by (1) delaying in demanding arbitration; (2) by litigating this action, including filing demurrers and engaging in extensive discovery to Plaintiff's

prejudice; and (3) by taking steps inconsistent with an intent to arbitrate, i.e., by failing to assert the arbitration agreement as an affirmative defense."

The trial court then proceeded to hold the trial readiness conference, by which time Defendant had filed the answer that had apparently not been filed earlier. Defendant appeals the order denying his motion to compel arbitration. The trial court issued a stay pending appeal.

DISCUSSION

We first address the contract interpretation issues presented, including the applicability and scope of the arbitration provision within the RPA. We then turn to the contentions regarding any waiver of the right to resort to this arbitration provision.

I

INTRODUCTION

Defendant's motion for an order compelling arbitration was brought under section 1281.2, alleging the existence of a written agreement to arbitrate a controversy and the refusal of a party to arbitrate. The trial court was thus required to determine whether an agreement to arbitrate the controversy exists and covers this dispute. In doing so, the court had before it the RPA, the MOA, and the SSA. Plaintiff also submitted extrinsic evidence in the form of his declaration that when he signed the RPA, he did not intend to create a waiver of his right to any court action related to the sale of stock in NEI. Plaintiff stated he never agreed that the securities sales transaction would be subject to arbitration under the real estate arbitration provision.

To evaluate this record, we first outline rules for contract interpretation in the arbitration context, and our standards of review. We are mindful of the " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 8-9; cited in *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 432-433 (*Hall*).) However, it is essential to the proper operation of that policy that " '[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation], and ' "[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission." ' [Citations.]" (*Ibid.*; see *Lopez v. Charles Schwab & Co. Inc.* (2004) 118 Cal.App.4th 1224, 1229.)

The purpose of contract interpretation is to give effect to the intention of the parties, and it requires a determination of what the parties meant by the words they used. (*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38 (*PGE*).) "Our objective in construction of the language used in the contract is to determine and to effectuate the intention of the parties. [Citation.] It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166 (*Winet*).)

In *Winet, supra*, 4 Cal.App.4th at pages 1165 to 1166, this court outlined the essential rules for determining when extrinsic evidence is appropriately used to clarify the contractual intentions of the parties. "We begin by noting the oft-stated rule that parol evidence is properly admitted to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the

evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' ([*PGE, supra,*] 69 Cal.2d 33.)" (*Winet, supra*, p. 1165.)

Where there are several contracts relating to the same matters, between the same parties, made as parts of substantially one transaction, they "are to be taken together." (Civ. Code, § 1642.) "Whether Civil Code section 1642 applies in a particular case is a question of fact for resolution by the trial court. [Citation.]" (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1675 (*Brookwood*).) On review, an appellate court will analyze whether there is any substantial evidence to support the trial court's findings on whether several writings constituted "substantially one transaction and should be taken together. [Citation.]" (*Ibid.*) In conducting that inquiry, the appellate court will not substitute its own deductions for those of the trial court. (*Ibid.*, fn. 6.) We next turn to the ruling denying arbitration, to apply these various rules together.

II

PRELIMINARY CONTRACT INTERPRETATION RULINGS

In *Winet, supra*, 4 Cal.App.4th at pages 1165 to 1166, this court outlined the two-step process a trial court will follow in deciding whether to admit parol evidence. In the case before us, the trial court conducted this process by provisionally considering the evidence concerning the parties' intentions, and by making an implied finding that the parties' contractual arrangements were somewhat ambiguous, with respect to the scope of the arbitration provision. Through this procedure, the court relied on Plaintiff's declaration about his understanding of the arbitration provision, as well as the showings about the contents of the three related agreements. On review, we treat that threshold

determination of ambiguity as a question of law, not of fact, and it is subject to independent review on appeal. (*Ibid.*)

We find the trial court reached an appropriate conclusion regarding "ambiguity" of the RPA in light of the other related agreements, and it properly considered additional evidence beyond the face of the documents. Plaintiff's declaration could be used to interpret the RPA term, "resulting transaction." This approach was consistent with an alternate method with which the courts are allowed to determine the intent of the parties in an agreement, by considering the surrounding circumstances to interpret the language of the contract. (*Winet, supra,* 4 Cal.App.4th at pp. 1167-1168.) Thus, "[w]e are instructed to consider parol evidence of the circumstances which attended the making of the agreement, ' ". . . including the object, nature and subject matter of the writing . . . " so that the court can "place itself in the same situation in which the parties found themselves at the time of contracting." [Citations.]' [Citation.]" (*Id*. at p. 1168.)

Therefore, the trial court appropriately considered the existence and text of the three related agreements, as well as the extrinsic evidence of the declaration, and decided the language of the RPA was "reasonably susceptible" to the interpretation urged, and therefore it had an adequate basis to consider the declaration "to aid in the second step-interpreting the contract. [Citation.]" (*Winet, supra,* 4 Cal.App.4th at pp. 1165-1166.) The rule of review we must apply to the remaining portion of its ruling (i.e., defining and applying the term "resulting transaction") depends upon whether the parol evidence was in conflict and required credibility determinations. If there is conflict, "any reasonable construction will be upheld as long as it is supported by substantial evidence. [Citation.]"

(*Id.* at p. 1166.) Alternatively, "when no parol evidence is introduced (requiring construction of the instrument solely based on its own language) or *when the competent parol evidence is not conflicting*, construction of the instrument is a question of law, and the appellate court will independently construe the writing. [Citation.]" (*Ibid.*, italics added.) A party's subjective declaration of intent is not enough to create an evidentiary conflict, since the objective test applies for determining contractual intent. (*Ibid.*, at fn. 3.)

Accordingly, this record requires us to treat the ruling as one which did not resolve any conflicting competent parol evidence, and we may independently construe the writings. (*Winet, supra*, 4 Cal.App.4th 1159, 1165-1166.) On doing so, we agree with the trial court's implied finding that the three related agreements should be considered together, and found to be ambiguous, with respect to determining the scope of coverage of the dispute resolution provision for a "resulting transaction." Further, even though the declaration of Plaintiff was itself not determinative regarding the intents of the contracting parties, that declaration and the evidence of the three agreements certainly amount to evidence of the surrounding circumstances, which can properly be used to determine intent. (*Winet, supra,* 4 Cal.App.4th at pp. 1167-1168; also see p. 1166, fn. 3.) By referring to the declaration in the ruling, the trial court made an implied finding the evidence was admissible for that purpose.

Utilizing this approach to the record on this procedural question, we next analyze the enforceability and scope of the arbitration provision with respect to these facts. This will also include our discussion of whether substantial evidence supports the trial court's

conclusion that the agreements retained a separate nature, regarding the substantive real estate and securities issues as presented in the complaint's allegations. (Civ. Code, § 1642.)

III

SCOPE AND APPLICABILITY OF ARBITRATION PROVISION

Defendant's position is that the arbitration language in the RPA is broad enough to encompass all the fraud and securities claims raised in the complaint. He contends the underlying transactions "clearly" amounted to an exchange of Plaintiff's real estate for stock. In support, he argues that since the MOA characterizes itself as "an adjunct to the [RPA]," and states that the intent of the property sale was to purchase stock, and since the complaint pleads damages arising in part from lost profits from the property, the arbitration provision was invoked. Also, the SSA includes a merger clause referring to "all prior and contemporaneous agreements," which he would interpret to invoke the same provision.

To analyze whether the dispute described by the allegations of the complaint arose "*out of this [RPA] or any resulting transaction*," we first examine its text. It provides for an appointment as follows: "The arbitrator shall be a retired judge or justice, *or an attorney with at least 5 years of residential real estate law experience*, unless the parties mutually agree to a different arbitrator . . . ." (Italics added.) We first observe that this arbitration provision is found in a form real estate contract, and it refers to the selected arbitrator as having expertise in real estate matters. If the scope of submission were

intended to incorporate securities issues, such expertise would logically have been referred to in the clause as well, but there is no such notation.

Defendant relies on *Hall, supra*, 18 Cal.App.4th 427, 435, in which the court construed a similarly worded arbitration clause (governing "[a]ny dispute or claim in law or equity arising out of this contract *or any resulting transaction* . . . ."). (Italics added). The court in *Hall* stated this was a relatively broad arbitration agreement, as opposed to one covering only disputes " 'arising from' " the overall contract. (*Ibid.*, citing *Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 530.) In *Hall*, the court was required to decide the scope of arbitration allowed under that provision, and it concluded that it was reasonable to read together the civil complaint for breach of contract, in addition to the arbitration clause or submission by the parties, for purposes of defining the issues to be submitted to arbitration. (*Hall, supra*, at pp. 435-437.) The appellate court decided the trial court had erroneously vacated an arbitration award for excess of jurisdiction, because it was reasonable for that arbitrator to determine that the scope of submission should include a partnership issue arising from contract, even though that was not specifically pled in the complaint. The court explained: "The arbitrator could have reached that conclusion by reading the agency allegations of the complaint broadly to include partnership, or he could have determined that by submitting all issues in the complaint, which incorporated the listing agreement, the parties agreed to submit all issues between them." (*Id.* at p. 437.)

Plaintiff points out, and we agree, that in *Hall, supra*, 18 Cal.App.4th 427, only contract claims were at issue in the parties' transactions, involving partnership and

agency, and that the nature of those theories justified a broad reading of the arbitration clause in that case. (*Id.* at pp. 430, 431, fn. 1.) Here, however, fraud and statutory securities claims are pled, and these are relatively different in character (tort) and origin (statute) from the real estate contract in which the arbitration provision is found. We need not read this arbitration clause as broadly as did the court in *Hall.*

Defendant also relies on *Brookwood, supra,* 45 Cal.App.4th 1667, in which the appellate court upheld a ruling that read together, under Civil Code section 1642, an employment contract that did not contain an arbitration clause, with other related contracts that did. All those contracts involved that plaintiff's employment as a registered securities representative, by two related companies at the same time, in a dual capacity: "Thus, the arbitration covenant in the Registered representative agreement, U-4 form, and incorporated NASD [National Association of Securities Dealers] provisions ran between plaintiff and Bank *notwithstanding there was no specific arbitration provision in the employment agreement for salaried employees*." (*Brookwood, supra,* at pp. 1675-1676; italics added.) Defendant here argues that this authority supports reading these three agreements together for arbitration purposes.

Plaintiff, however, correctly contends that *Brookwood, supra,* 45 Cal.App.4th 1667, is distinguishable, because in that case, the plaintiff's substantive claims were all directly related to the various employment agreements, such as age discrimination and wrongful termination, so the agreements could legitimately be read together. Here, the RPA is dominantly only a part of the history of the securities transaction, such that the securities fraud issues are insufficiently related to the underlying real property

transaction, for arbitration purposes. Objectively, the RPA arbitration provision was not reasonably anticipated by the parties to encompass any later-arising securities claims or related fraud allegations.

Next, examining the complaint, the relief sought by Plaintiff in the prayer is rescission of the SSA, as well as tort damages for fraud or negligent misrepresentation. Defendant is not justified in characterizing the underlying real property sale as an "exchange" for stock, since the sale was expressly made for the purpose of raising money for Plaintiff to purchase these shares. Nothing in the record indicates Defendant would have accepted title to the property instead of cash to pay for the securities, and the property was immediately resold. Even taking into account the MOA language that states the MOA is an "adjunct" agreement to the RPA, the alleged breaches of the SSA (entered into three weeks later) form the gravamen of the complaint here. Nothing remains of the real estate transaction to be remedied through arbitration. For example, the reference in the complaint to lost profits from real estate does not amount to a contract claim based on that real estate transaction.

Moreover, the merger clause in the SSA does not reasonably lend itself to an interpretation that this contract expressly incorporated all the provisions of the prior two agreements. Rather, the SSA became the operative securities agreement, once the cash had been raised, and its merger clause reasonably related only to any negotiations or agreements related to the stock purchase, not the means of raising cash. The trial court did not have to make factual findings at the hearing about which was the prevailing agreement. Instead, it had a sufficient factual basis to analyze the transactions and to

conclude that the later SSA, based on the private offering document, was substantively and procedurally independent of the RPA and its "adjunct" MOA, such that the arbitration clause was not invoked. (Civ. Code, § 1642.)

The scope of arbitration is " '. . . a matter of agreement between the parties' [citation], and " '[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.' " [Citations.]' " (*Hall, supra*, 18 Cal.App.4th at pp. 432-433.) There is no justification in the record to read the RPA arbitration clause so broadly as to encompass the tort and statutory securities claims raised in the complaint. The trial court's ruling was correct in this respect.

IV

WAIVER

A. Applicable Principles

Public policy considerations strongly favor arbitration as a means of settling disputes. (*Saint Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195.) However, a trial court may deny a petition to compel arbitration if it finds the moving party has waived that right. (*Ibid*.; *Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1363 (*Berman*).) " '[T]he question of waiver is one of fact, and an appellate court's function is to review a trial court's findings regarding waiver to determine whether these are supported by substantial evidence.' [Citation.]" (*Id.* at p. 1363.) The party seeking to establish waiver of arbitration must meet a heavy burden of proof. (*Saint Agnes, supra,* at p. 1195.) However, it is well accepted that "[i]f more than one reasonable inference may be drawn from undisputed facts, the substantial evidence

rule requires indulging the inferences favorable to the trial court's judgment. [Citation.]" (*Davis v. Continental Airlines, Inc.* (1997) 59 Cal.App.4th 205, 211 (*Davis*).)

"There is no single test for waiver of the right to compel arbitration, but waiver may be found where the party seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration, (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with willful misconduct. [Citation.] The moving party's mere participation in litigation is not enough; the party who seeks to establish waiver must show that some prejudice has resulted from the other party's delay in seeking arbitration. [Citation.]" (*Davis, supra*, 59 Cal.App.4th 205, 211-212.) (However, it should be noted that the bad faith criterion is not seriously argued here and we do not find it necessary to consider that issue.)

Additional specific criteria which may be considered in determining waiver include " 'whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate,' " and " 'whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay.' " (*Sobremonte v. Superior Court* (1998) 61 Cal.App.4th 980, 992 (*Sobremonte*).) Participating in " 'important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration]' " may be considered a step inconsistent with arbitration enforcement, where prejudice is shown. (*Ibid.*)

Where extensive discovery has taken place in the judicial forum, this can amount to a significant delay in asserting the right to arbitration, destroying "whatever

efficiencies that would otherwise have been available to [a party] through arbitration. Simply put, ' "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." ' [Citations.]" (*Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553, 558 (*Guess?*), citing *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 784.) Although an affirmative defense may be used to raise a claim of entitlement to arbitration, a lack of such a pleading is only one factor to be considered in the waiver question. (*Guess?, supra*, 79 Cal.App.4th 553, 557-558.)

B. Application

Although we have determined above that the arbitration provision in the RPA cannot properly be invoked to resolve the substantive fraud and other claims pled in this complaint, we find it appropriate to address the alternative arguments regarding waiver of any arbitration right. We examine the factual and procedural background in light of the above standards to determine if the trial court was justified in finding that Defendant's actions were not, in any case, consistent with an intention to preserve a right to enforce the arbitration clause in the RPA.

First, with respect to any steps taken by Defendant that were inconsistent with an intent to invoke arbitration, he and his attorneys participated in discovery and in trial preparation from August 2005 until March 2006, without making any sufficient request to the court that would have allowed it to compel arbitration. Once Defendant's new attorney substituted in, he realized that the case was not yet prepared and he accordingly served special interrogatories and noticed Plaintiff's deposition for December 2005. At

that deposition on December 21, 2005, defense counsel informally requested that arbitration be pursued, but nothing happened toward that end until the erroneous motion to dismiss was filed. At the March 23 hearing on the motion to compel arbitration, the trial court also had before it Defendant's motion to compel further responses by Plaintiff to special interrogatories. That motion was denied as untimely and sanctions were awarded to Plaintiff.

Ordinarily, discovery is not available in aid of arbitration, except as provided in section 1283.05, due to the expedited nature of such a proceeding. (*Davis, supra,* 59 Cal.App.4th at p. 214.) Where a defendant engages in extensive discovery from plaintiff before moving to compel arbitration, the trial court may properly find that defendant waived arbitration. (*Ibid.*; *Guess?, supra,* 79 Cal.App.4th 553, 558.) Resorting to judicial procedures to enforce discovery requests is time-consuming, expensive, and inconsistent with a summary proceeding such as arbitration. (*Sobremonte, supra,* 61 Cal.App.4th at p. 992.) All these factors appear in this record and weigh against compelling arbitration, and the trial court could reasonably find prejudice to Plaintiff from the nature of the court proceedings to date. The discovery was not limited to promoting arbitration. During the relevant time periods, Defendant took only informal and uncertain steps toward invoking arbitration, and the trial court had a sufficient basis to find waiver on that basis.

The record substantially demonstrates that Defendant unreasonably delayed in seeking arbitration, even taking into consideration the difficulties he had with his legal representation (illness of the first attorney), and then the lapse of about six months after

the operative pleading was filed, before the time of filing of the appropriate motion to compel arbitration, rather than the inadequate motion to dismiss. Defendant did not effectively take any substantive action to move the matter toward arbitration until close to the motion cut-off date.

Also at the March 23 hearing, Defendant was seeking to amend the answer to ensure the matter could be heard on the merits, and to add an affirmative defense asserting a right to arbitration. By the time the trial readiness conference was held, Defendant had filed his answer, although leave to amend had been denied. Thereafter, the parties apparently discussed potential ex parte appearances by Defendant to seek a stay pending appeal of the denial of the motion to compel arbitration, and by Plaintiff to challenge the filing of the answer or seek to have it stricken. On March 30, the trial court ordered the matter stayed pending appeal. The minute order also refers to some kind of request by Plaintiff to set a motion to strike the answer, but no ruling appears in the record.

It is not dispositive that there was delay in filing Defendant's answer that characterized the arbitration agreement as an affirmative defense, in light of all the other circumstances. However, there is inconsistency in the record on whether the amended answer was duly filed and accepted as a legitimate pleading by the trial court. We will accordingly direct the trial court upon remand to vacate the stay and also to conduct appropriate further proceedings to resolve the status of the pleadings, consistent with the views expressed in this opinion that the matter should be set for hearing on the civil trial

calendar, not in private arbitration. (*In re Marriage of Melone* (1987) 193 Cal.App.3d 757, 766 [affirmance with directions appropriate in some cases].)

In conclusion, the trial court was justified in finding substantial evidence of waiver of any right to resort to arbitration. Plaintiff sufficiently demonstrated prejudice, as the trial court expressly and impliedly found, through the efforts made to litigate the issues in other ways. "This finding of fact by the trial court may not be disturbed by this court unless we find it supported by no substantial evidence." (*Berman, supra,* 80 Cal.App.4th at p. 1365.) "It is not the function of this court to reweigh the evidence and substitute its judgment for the judgment of the trial court." (*Id.* at p. 1373.) We affirm the trial court's denial of the motion to compel arbitration.

DISPOSITION

The order denying Defendant's petition to compel arbitration is affirmed and the case is remanded for further proceedings to vacate the stay and to clarify the status of the answer, consistent with the views expressed in this opinion. Costs are awarded to Plaintiff.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

IRION, J.